

ORIGINAL

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

ORIGINAL
FILE

In the Matter of:)

ET Docket No. 92-28

MOTOROLA SATELLITE)
COMMUNICATIONS, INC.)

PP-32

Request for Pioneer's Preference)
to Establish a Low-Earth Orbit)
Satellite System in the 1610-)
1626.5 MHz Band.)

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APR 23 1992

Federal Communications Commission
Office of the Secretary

To: The Chief Engineer

**OPPOSITION TO REQUEST FOR CONFIDENTIAL
TREATMENT OF EX PARTE PRESENTATIONS**

TRW Inc. ("TRW"), by its attorneys, hereby opposes the request for confidential treatment of ex parte presentations filed by Motorola Satellite Communications, Inc. ("Motorola") on April 10, 1992, in the above-styled pioneer's preference proceeding.^{1/} For the reasons stated below, the Chief Engineer must deny the request for confidential treatment, permit public inspection of the materials submitted in "an envelope," and impose other sanctions.

I. INTRODUCTION

On April 10, 1992, Motorola filed a "Supplement to Request for Pioneer's Preference" which included an attachment comprising Motorola-generated media hype and a separate Request

^{1/} Letter of Philip L. Malet, attorney for Motorola, to Ms. Donna R. Searcy, dated April 10, 1992 ("Request for Confidential Treatment").

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for Confidential Treatment of yet additional attachments to its Supplement.^{2/} Motorola states that the materials for which it seeks confidential treatment are submitted "in support of Motorola's pending request for a pioneer's preference" These materials purportedly contain "trade secrets and commercial, financial or technical data which must be guarded from Motorola's competitors."^{3/}

II. MOTOROLA'S ATTEMPT TO INFLUENCE DECISIONMAKERS WITH "CONFIDENTIAL" MATERIALS VIOLATES THE COMMISSION'S EX PARTE RULES AND BASIC TENETS OF FUNDAMENTAL FAIRNESS AND ADMINISTRATIVE DUE PROCESS.

A. Motorola's Request is a Prima Facie Violation of the Commission's Ex Parte Rules.

TRW, Ellipsat Corporation, Loral/Qualcomm Satellite Systems, Inc., Constellation Communications, Inc., and Motorola have each requested a pioneer's preference associated with the processing of rulemaking requests to establish a Low Earth Orbit Mobile Satellite Service above 1 GHz ("Big LEO"). Each party requesting a Big LEO pioneer's preference has opposed the

^{2/} TRW today will also file a Motion to Strike or, in the Alternative, to Place Motorola's Supplement On Public Notice.

^{3/} Because TRW focuses on Motorola's violation of the ex parte rules, it does not here respond to the merits of Motorola's claim of confidential treatment of materials it provided to the Commission in an "envelope." TRW, however, reserves the right to brief fully the adequacy of Motorola's Request for Confidential Treatment in a later pleading, should that be necessary.

grant of Motorola's request for a pioneer's preference. Motorola, in turn, has opposed the grant of a pioneer's preference to any entity but itself. It is an understatement to characterize the Commission's proceeding in ET Docket No. 92-28, in which a determination will be made whether to grant a pioneer's preference to one or more Big LEO proponents, as a strongly contested proceeding.

In establishing pioneer's preference rules, the Commission determined that contested requests for pioneer's preferences are adjudicative proceedings, and thus are "restricted" proceedings, subject to the Commission's prohibitions against ex parte presentations. See Establishment of Procedures to Provide a Preference to Applicants Proposing An Allocation for New Services, 6 FCC Rcd 3488, 3493 (1991); 47 C.F.R. § 1.1208. A "presentation" is defined as "[a]ny communication directed to the merits or outcome of a proceeding." 47 C.F.R. § 1.1202(a).

By Motorola's own admission in its Request for Confidential Treatment, the materials for which it seeks confidential treatment and nondisclosure are intended to "support" its pending request for a pioneer's preference. Motorola thus has clearly and knowingly directed these materials to the merits of its application for a pioneer's preference. Because these materials have not been made available to the other parties requesting pioneer's preferences, their submission under a cloak of confidentiality

undermines the very purpose for which the ex parte rules were established: "[t]o ensure that the Commission's decisional processes are fair, impartial, and otherwise comport with the concept of due process. . . ." 47 C.F.R. § 1.1200(a).

Motorola's submission to the Chief Engineer of documents that were not simultaneously served on the other parties to ET Docket No. 92-28, regardless of the Request for Confidential Treatment, constitutes a clear violation of the Commission's ex parte rules. See 47 C.F.R. §§ 1.1202(b), 1.1208.

The harm to competing applicants, which the ex parte rules are intended to protect against, has already been accomplished simply by Motorola's filing materials intended to affect the outcome of the Big LEO pioneer's preference proceeding. Decisionmakers have been exposed to materials which Motorola claims to be proprietary and confidential, but nonetheless are clearly directed to the merits of its own request for a pioneer's preference. Motorola's Request for Confidential Treatment suggests that if the request is denied, it wants the materials returned without further disclosure. Returning the materials, however, does not sufficiently clear the tainted record of this proceeding. Disclosure of the materials to TRW and the other applicants is the only adequate safeguard against the impropriety of Motorola's attempt unlawfully to influence the results of this proceeding.

The Commission's rules provide that:

"Prohibited written ex parte presentations, all statements and correspondence relating thereto, all statements and correspondence relating to prohibited oral ex parte presentations shall be placed in a public file which shall be associated with, but not made a part of, the file or record of the proceeding to which the presentations pertain."

47 C.F.R. § 1212(d). Therefore, the only course of action permitted under the rules is full disclosure to the public of Motorola's written and oral presentations (including videotapes and diskettes), and exclusion of the materials from the record in ET Docket No. 92-38.

Under circumstances such as these, where a party to a contested adjudicative proceeding has knowingly violated the ex parte rules in an effort to affect the results of the proceeding, sanctions are also required. TRW believes the only appropriate sanction is the dismissal of Motorola's request for pioneer's preference (File No. PP-32) as provided for in 47 C.F.R. § 1.1216(a). Motorola admitted that the intent of the materials submitted is to "support" Motorola's application. This is clearly a knowing violation which merits the only appropriate sanction provided for in the Commission's rules -- dismissal.^{4/}

^{4/} In keeping with the provisions of the ex parte rules, a copy of this pleading is being provided to the Office of General Counsel and the Office of the Managing Director. See Note following 47 C.F.R. § 1.1200(b) and 47 C.F.R. § 1.1212.

**B. The Courts and Congress Have Chastised
Motorola's Practice of Knowingly Violating
Basic Principles of Administrative Due Process.**

Motorola's request to hold in confidence ex parte presentations is not just inconsistent with the Commission's regulations, it flouts established principles of administrative due process. In a landmark case on point, the U.S. Court of Appeals for the District of Columbia Circuit made amply clear that reasoned administrative decisionmaking rests with an adversarial process where parties to a proceeding engage in robust debate on the issues which an agency must adjudicate. See Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829, rehearing denied, 434 U.S. 988 (1977). The court found it "intolerable" that one record might exist for the public and another for the agency and those "'in the know.'" Id. at 54. This is precisely what Motorola's submission of "confidential" materials has accomplished. The court further noted the basic "inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law." Id. at 56.

The Congress, likewise, has legislated to ensure openness in administrative adjudication. Ex parte presentations, whether written or oral, which are relevant to the merits of adjudicative proceedings, are specifically prohibited by statute. See 5 U.S.C.A. § 557(d) (1977). The

Commission, even if it were so inclined, cannot waive this statutory prohibition on ex parte presentations.

III. CONCLUSION

Motorola's Request for Confidential Treatment is nothing more than a convenient vehicle to flout the Commission's well-established rules prohibiting ex parte presentations in contested adjudicatory proceedings. Basic principles of administrative due process and reasoned decisionmaking mandate denial of Motorola's request. Full disclosure of the presentations and imposition of appropriate sanctions to safeguard against continuing abuses of this magnitude are the only appropriate remedies.

Respectfully submitted,

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April 23, 1992

CERTIFICATE OF SERVICE

I, Kaigh K. Johnson, hereby certify that a copy of the foregoing "Opposition to Request for Confidential Treatment of Ex Parte Presentations" was served by first-class mail, postage prepaid, this 23rd day of April, 1992 on the following persons:

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